93-375
No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOUISIANA JOHNSON OWENS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner's due process rights were violated within the meaning of *Doyle v. Ohio*, 426 U.S. 610 (1976) when the Assistant United States Attorney commented on Petitioner's failure to identify Reginald Roberts and Jerome Williams at Petitioner's arraignment?

2. Whether Petitioner was denied her constitutional right to cross-examine Reginald Roberts concerning his prior juvenile convictions?

3. Whether Petitioner's due process rights were violated by the trial court's refusal to suppress eyewitness identification testimony where the identification at issue was the identification of a third party and not the defendant in a criminal case?

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No. _____

In The—
SUPREME COURT OF THE UNITED STATES
October Term, 1993

LOUISIANA JOHNSON OWENS
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Court of Appeals is attached hereto as Appendix A. The judgment of the United States District Court is attached hereto as Appendix B.

PARTIES TO THE PROCEEDING

All parties to this proceeding are the parties shown in the caption of the case, *Louisiana Johnson Owens vs. United States of America*.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 and Rule 13 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part: "No person shall...be deprived of life, liberty or property, without due process of law..."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE FACTS

The Petitioner, Louisiana Johnson Owens was convicted after a jury trial of conspiracy to commit a postal robbery, in violation of 18 U.S.C. § 371 and 2114; postal robbery, in violation of 18 U.S.C. § 2114; and use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Petitioner was sentenced to 130 months in custody. The convictions were affirmed by the United States Court of Appeals for the Ninth Circuit.

Petitioner Owens, formerly a postal worker at the North Hollywood Post Office, is accused of hiring two men to rob it. According to the testimony of government witnesses, Roberts and Williams, Owens met with her accomplices several times to plan the robbery. She provided a tour of the facility , keys to gain access, and instructed the two to carry a gun. On February 4, 1991, Robert and Williams robbed the North Hollywood branch, seizing over $25,000. The Government claimed that Owens assisted them by appearing to be a hostage and by tying up the other employees under orders from the gunmen.

Approximately a week before the robbery, Arnulfo Garcia, a relief clerk assigned to the branch, saw a young black man and a middle-aged black woman

talking inside the post office. Three months later an agent showed Garcia photographs of three black men. One of the photos resembled Roberts. Garcia testified that the photo of Roberts "best described" the man he saw. Petitioner unsuccessfully moved to strike the evidence.

Owens testified that she did not plan or assist in the robbery. She knew Roberts and Williams only as the friends of her son. She recalled that one afternoon before the robbery Roberts and Williams were waiting for her son to return home while she was talking on the telephone with a friend about the general conditions of work, including the lack of building security. After the conversation ended, they briefly questioned her about previous robberies. She also testified that she made a general practice of leaving her purse (containing her keys to the post office) on the kitchen counter top, making the keys accessible to anyone who entered the home.

In the course of cross-examining Owens, the prosecutor enquired into her failure to identify her coconspirators at arraignment. Owens acknowledged that she recognized Roberts and Williams but did not bring this to the attention of the police because she was never asked. The judge sustained Petitioner's objection and issued two curative instructions. The court denied Petitioner's motion for a mistrial.

Petitioner, under Fed. R. Evid. 609(d), sought to introduce evidence of Robert's prior juvenile convictions. These included snatching a purse form an eight-month pregnant woman and making off with her car (charged of robbery and vehicle theft, respectively). The district court denied the request.

REASONS FOR GRANTING WRIT

I

Petitioner's Due Process Right Were Violated Within The Meaning Of *Doyle v. Ohio*, 426 U.S. 610 (1976) When The Assistant United States Attorney Commented On Petitioner's Failure to Identify Reginald Roberts And Jerome Williams At Petitioner's Arraignment.

During the cross-examination of the Petitioner during the trial, the prosecutor elicited the fact that Petitioner recognized Roberts and Williams, as persons that she knew, and did not say anything to anyone at the arraignment about this fact. (2 R.T. 170). Defense counsel moved for a mistrial. However the defense motion for a mistrial was denied. (2 R.T. 170) The question and the answer were stricken by the District Court and the jury was admonished to disregard the entire series of questions. (2 R.T. 172) Petitioner urges the Court to grant the certiorari in this case on the grounds that the questioning by the prosecutor constituted an improper comment on her post-arrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the defendants had taken the witness stand and offered an exculpatory explanation for their participation in what the state's evidence had portrayed as a routine marijuana transaction. On cross-examination, the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of their arrest. The Court held that such cross-examination was

fundamentally unfair and therefore violated the due process clause of the Fourteenth Amendment.

The source of the unfairness was the implicit assurance contained in the *Miranda* warnings "that silence will carry no penalty." In *Doyle v. Ohio*, *supra*, the Court stated:

> "Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (426 U.S. at 618-619.)

The *Doyle* case was reaffirmed in *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) where the Court held that a prosecutor's argument using the defendant's post-*Miranda* warnings silence as evidence of sanity was held to be a violation of the defendant's right to due process of law. In the *Wainwright* case, the Court noted that *Doyle* rests on the "fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." (*Id.* at 630.) The Court also noted that "*Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the due process clause requires." (*Id.* at 630.)

The United States Supreme Court in *Greer v. Miller*, 483 U.S. 756 (1987), also reaffirmed its earlier decision

in *Doyle v. Ohio*, 426 U.S. 610 (1976). In the *Greer* case, a prosecutor on cross-examination asked the defendant why the defendant did not tell his story to anyone when he was arrested. The record indicated that right after his arrest, the defendant was given his *Miranda* warnings. Greer's defense counsel immediately objected and the trial judge, although denying a motion for mistrial, sustained the objection and instructed the jury to ignore the question by the prosecutor concerning the defendant's post-arrest silence after receiving *Miranda* warnings.

In *Greer*, the Court held that no *Doyle* violation occurred because the jury was instructed to disregard the question at the time of the objection and later the judge instructed the jurors at the close of the case to disregard questions to which objections were sustained. The Court noted that no further questioning or argument with respect to the defendant's post-arrest silence occurred.

Nevertheless, in *Greer v. Miller*, *supra*, the Court reaffirmed the holding in *Doyle v. Ohio*, 426 U.S. 610 (1976) that "The use for impeachment purposes of petitioner's silence, at the time of arrest, and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Greer v. Miller*, 483 U.S. 756 (1987). The Court noted that post-arrest silence may not be particularly probative of guilt. It was also again noted that *Miranda* warnings contained an implicit assurance "that silence will carry no penalty." (*Id.*)

Thus, it was stated that "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284,

291 (1986); *Greer v. Miller*, *supra*, at 628-629; see also, *United States v. Hale*, 422 U.S. 171 (1975); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Anderson v. Charles*, 447 U.S. 404 (1980).

II

The Appellant Was Denied Her Constitutional Right To Cross-Examine Reginald Roberts Concerning His Prior Juvenile Convictions.

Prior to trial, counsel for Petitioner advised the Court that he intended to impeach prosecution witness Reginald Roberts with two prior juvenile convictions. The convictions were for purse snatching, which was charged as a robbery, and vehicle theft. Counsel for Petitioner noted that such prior juvenile court convictions are admissible to impeach witnesses pursuant to Federal Rules 609(d) (1 R.T. 4-6) The District Court ruled that Appellant could not cross-examine Reginald Roberts concerning the prior juvenile convictions. (1 R.T. 7.) The Petitioner urges the court to grant certiorari in order to review whether this ruling violated the Petitioner's Constitutional right to confront and cross examine the witnesses against her.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Pointer v. Texas*, 380 U.S. 400 (1965). The primary interest protected by the confrontation clause is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "This right to confrontation is embodied substantially by the

right to cross-examine adverse witnesses." *Chipman v. Mercer*, 628 F.2d 528, 530 (9th Cir. 1980).

More recently in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court again reemphasized that an accused is constitutionally entitled to cross-examine prosecution witnesses in order to explore potential bias. The Court in *Van Arsdall* stated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ...could appropriately draw inference relating to the reliability of the witness.'" *Delaware v. Van Arsdall, supra*, at 680.

In criminal proceedings, Federal Rules of Evidence, Rule 609 (d) allows evidence of a juvenile adjudication of a witness other than the defendant, if the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. Rule 609(d) provides the following:

> "Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt of innocence."

The government's case against the Petitioner was based entirely on the credibility of James Williams and

Reginald Roberts. Any evidence which impeached the credibility of Williams and Roberts was critical to the defense. The exclusion of this impeachment evidence violated Petitioner's right to confront and cross examine her accusers and deprived her of a fair trial.

III

Petitioner's Due Process Rights Were Violated By The Trial Court's Refusal To Suppress Eyewitness Identification Testimony Where The Identification At Issue Was The Identification Of A Third Party And Not The Defendant In A Criminal Case.

The government attempted to establish that one week prior to the robbery of the post office, Petitioner was seen speaking to Reginald Roberts at the post office. This was an important fact because Reginald Roberts claimed that such a meeting took place in order to plan the robbery with Petitioner. Robert's testimony on this point, however, was suspect because he actually committed the robbery and he was testifying against Petitioner in exchange for government assistance in receiving a lighter sentence.

To corroborate Roberts, the government called Arnulfo Garcia as a witness to testify that he saw a woman who looked like Petitioner talking to a man who looked like Roberts at the post office one week prior to the robbery. Because Arnulfo Garcia made his identification of Roberts from a suggestive photographic showup three weeks after the robbery, Petitioner moved to strike his identification testimony as being in violation of due process under *Stovall v. Denno*, 388 U.S. 293

(1967). The motion was denied by the trial court. The Ninth Circuit affirmed and stated this Court's opinion in *Stovall* did not apply to identifications of the accused. Petitioner urges the Court to grant certiorari on this issue and extend the *Stovall* line of authority to any impermissibly suggestive identification made in a criminal case.

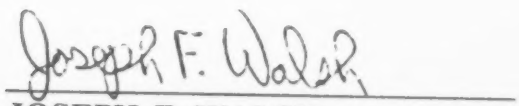
Under *Stovall v. Denno*, 388 U.S. 293, 301-302 (1967), the court must suppress eyewitness identification testimony when the pre-trial confrontation between the eyewitness and the accused is "so unnecessarily suggestive that [the accused is] denied due process of law." In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court stated that "each case must be considered on its own facts, and that convictions based on eyewitness identification by photograph will be set be aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In evaluating a claim under the *Simmons* and *Stovall* cases, the Courts must consider "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*,409 U.S. 188, 199 (1972). See also, *Manson v. Brathwaite*, 432 U.S. 98 (1977). The due process principles in these cases apply equally to third party identifications, such as the identification in this case. To the extent that an improper identification contributes to a conviction, it violates due process.

CONCLUSION

Based upon the foregoing, Petitioner urges that this writ be granted.

Respectfully submitted,



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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

91-50870
D.C. No. CR-91-0147-RMY-1

LOUISIANA JOHNSON OWENS,
Defendant-Appellant,
v.
THE UNITED STATES,
Plaintiff-Appellee.

MEMORANDUM*

Before BROWNING, SCHROEDER and FLETCHER,
Circuit Judges.

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted December 8, 1992
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Defendant Owens appeals her jury convictions for conspiracy to commit a postal robbery, in violation of 18 U.S.C. §§ 371 and 2114; postal robbery, in violation of 18 U.S.C. § 2114; and use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). The district court had jurisdiction pursuant to 18 U.S.C. § 3232. The jurisdiction of this court rests on 29 U.S.C. § 1291. We affirm.

FACTS

Defendant Owens, formerly a postal worker at the North Hollywood Post Office, is accused of hiring two men to rob it. According to the testimony of government witnesses, Roberts and Williams, Owens met with her accomplices several times to plan the robbery. She provided a tour of the facility , keys to gain access, and instructed the two to carry a gun. On February 4, 1991, Robert and Williams robbed the North Hollywood branch, seizing over $25,000. Owens assisted them by appearing to be a hostage and by tying up the other employees under orders from the gunmen.

Approximately a week before the robbery, Arnulfo Garcia, a relief clerk assigned to the branch, saw a young black man and a middle-aged black woman talking inside the post office. Three months later an agent showed Garcia photographs of three black men. The agent believed they resembled Roberts, but he did not ask Garcia to describe the young black man he had seen before showing him the pictures. Garcia testified that one of these photographs "best described" the man he saw. Defendant unsuccessfully moved to strike the evidence.

Owens provides a different account of the events leading up to the robbery. She testified that she did not plan or assist in the robbery. She knew Roberts and Williams only as the friends of her son, "Pops". She recalled that one afternoon before the robbery Roberts and Williams were waiting for her son to return home while she was talking on the telephone with a friend about the general conditions of work, including the lack of building security. After the conversation ended, they briefly questioned her about previous robberies. She also testified that she made a general practice of leaving her purse (containing her keys to the post office) on the kitchen counter top, presumably making the keys accessible to anyone who entered the home.

In the course of cross-examining Owens, the prosecutor enquired into her failure to identify her coconspirators at arraignment. Owens acknowledged that she recognized Roberts and Williams but did not bring this to the attention of the police because "nobody never asked". Supp. Excerpts of Record at 21. The judge sustained defendant's objection and issued two curative instructions; one immediately after a side-bar conference, the other as part of the general instructions to the jury not to consider evidence to which an objection was sustained. He denied defendant's motion for a mistrial.

Defendant, under Fed. R. Evid. 609(d), sought to introduce evidence of Robert's prior juvenile convictions. These included snatching a purse form an eight-month pregnant woman and making off with her car (charged of robbery and vehicle theft, respectively). The district court denied the request. Defendant was permitted to cross-examine both Roberts and Williams on their initial status as codefendants and on their plea agreements with

the Government to testify against her. Owens was convicted and sentenced to 130 months imprisonment.

STANDARDS OF REVIEW

We review de novo whether a prosecutor's inquiry into the postarrest silence of a defendant violates her Fourteenth Amendment rights to a fair trial. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *United States v. Newman*, 943 F.2d 1155, 1157 (9th Cir. 1991). Although we review limitations on cross-examination for abuse of discretion, we review de novo "[w]hether limitations on cross-examination are so severe as to amount to a violation of the confrontation clause." *United States v. Vargas*, 933 F.2d 701, 704 (9th Cir. 1991). We review evidentiary rulings for abuse of discretion. *United States v. Houser*, 929 F. 2d 1369, 1373 (9th Cir. 1990).

DISCUSSION

We address three questions. First, if the prosecutor committed a *Doyle* violation, was it harmless error? Second, was Owens denied her Sixth Amendment right to confront witnesses against her as a result of the district court's Rule 609 (d) ruling? And last, did the district court abuse its discretion in refusing to strike an eyewitness identification by the government witness?

I

The Fourteenth amendment bars "'the use for impeachment purposes' of a defendant's postarrest silence." *Greer v. Miller*, 483 U.S. 756, 763 (1987) citing *Doyle*, 426 U.S. at 619. In *Doyle* the court held that

prosecutorial comment on an arrestee's silence after Miranda warnings constituted constitutional error. 426 U.S. at 619. However, *Doyle* violations are subject to harmless error analysis. *Newman*, 943 F.2d at 1158; *Bradford v. Stone*, 594 F.2d 1294, 1295 (9th Cir. 1979); *see also*, *Greer*, 483 U.S. at 767-68 (Stevens, J., concurring).

During cross-examination, the prosecutor posed a series of questions that began as follows:

Q: Mrs. Owens you say you know Reginald Roberts; isn't that right?

A: Yes.

Q: You know Reginald Roberts because he's a friend of Pops's; right?

A: Yes.

Q: So on February 6th, when you were arraigned, you recognized Reginald Roberts, didn't you?

A: At the arraignment, that was first time of me seeing Reginald and I recognized him.

Q: <u>But you never told anybody that was Pops' friend, did you?</u>

A: Nobody never asked me.

Q: <u>You didn't think it was significant</u> that the person that robbed the post office was a friend of your son's?

A: Repeat your question, please.

. . . .

Q: At the arraignment were Reginald Roberts and Jerome Williams; right?

A: Right.

Q: And you recognized them, didn't you?

A: Yes, I did recognize them.
Q: And you never said anything to anybody: isn't that right?

Supp. Excerpts of Record at 21-22 (emphasis added). The prosecutor appears to have been advancing from Owens "knowing" Roberts, to "recognizing" Roberts, to "saying something" about knowing him to the police.[1] Her silence was highlighted in three questions. First, "You never told anybody . . .?" Second, "Didn't [you] think it was significant . . .?" Third, "You never said anything to anybody . . .?" Owens answered only one question. She effectively admitted her silence at arraignment by justifying it: "nobody never asked me."[2] On the second question she called for a clarification before answering. Her lawyer interrupted before she could answer the last question. After the sidebar discussion, the trial judge characterized the "series of questions" as going "to whether Ms. Owens *made any statement* regarding the identity of the codefendants at the time of the arraignment." Excerpts of Record at 16 (emphasis added). Assuming, without deciding, that a *Doyle* violation occurred, we analyze whether it constituted harmless error. *Cf. United States v. Gabay*,

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1. As in *Greer*, the exchange came at the beginning of the cross-examination. *Cf. Greer*, 483 U.S. at 759, 773.

2. *Cf. Bradford v. Stone*, 594 F.2d 1294, 1295 (9th Cir. 1979) (finding the "fact of petitioner's post-arrest silence" established when "petitioner responded [to a question about whether he had said anything to the police] that he had not--because *he had not been asked*")(emphasis added).

923 F.2d 1536, 1541 (11th Cir. 1991) (analyzing potentially improper exchange for harmless error).

On direct appeal, where a *Doyle* violation is alleged, we decide whether the error was harmless beyond a reasonable doubt under the *Chapman* standard. *See Newman*, 943 F.2d at 1158 (citing *Chapman v. California*, 386 U.S. 18 (1967); *Alo v. Olim*, 639 F.2d 466, 469 (9th Cir. 1980); *see also Greer*, 483 U.S. at 767 (Stevens, J., concurring) (direct review standard); *cf. Brecht v. Abrahamson*, 61 U.S.L.W. 4335 (U.S. April 21, 1993) (applying less demanding standard on collateral review). The test is whether the "comment is extensive, [whether] an inference of guilt from silence is stressed to the jury as a basis of conviction, and [whether] there is evidence that could have supported acquittal." *Quigg v. Crist*, 616 F.2d 1107, 1110 (9th Cir.), *cert. denied*, 499 U.S. 922 (1980); *see also Newman*, 943 F.2d at 1158; *United States v. Espinosa*, 827 F.2d 604, 616 (9th Cir. 1987). "[W]here the prosecutorial comment was a single isolated statement, where it did not stress any reference to guilt, and where it was followed by curative instructions, we have been reluctant to reverse." *Espinosa*, 827 F.2d at 616.

Although the "series of questions" and one answer could not be described as a "single isolated statement," the weight of evidence against Owens, combined with the trial judge's unambiguous curative instructions, reduced the exchange, even if improper, to harmless error. The questions the prosecutor posed to Owens stressed silence rather than guilt. He never returned to her silence during the arraignment in closing arguments.

By contrast, in *Newman*, the trial court gave confusing guidance. First, it allowed the prosecutor to proceed with the improper line of questioning, then it

issued an instruction. Shortly afterwards, faced with a continuation of the same line of questioning, it overruled defendant's objection. We consequently concluded that the extensive comments led ineluctably to the conclusion that Newman "must have been guilty because an innocent person would not have remained silent." *Newman*, 943 F.2d at 1158. Moreover, the *Newman* court indicated that its "decision [was] bolstered by the overall weakness of the government's case." *Newman*, 943 F.2d at 1158. The same cannot be said here. Although the evidence against Owens was in part circumstantial, it is compelling.

The Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses in a manner "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Reiger v. Christensen*, 789 F.2d 1425, 1433 (9th Cir. 1986).

Rule 609(d) provides:

> Evidence of juvenile adjudications is generally not admissible...however, in a criminal case [a court] may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attach the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Fed. R. Evid. 609(d). The district court denied defendant's motion to introduce evidence of one government witness' prior juvenile convictions.

In reviewing Owens' Sixth Amendment claim, we determine "whether the jury, without the cross-examination [Owens] desired, [was] otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." *Bright v. Shimoda*, 819 F.2d 227, 228 (9th Cir. 1987) *cert.* denied 485 U.S. 970 (1988). The *Reiger* court found that evidence of a witness' prior shoplifting conviction did not suggest any bias or any "special reason to cooperate with the government" and was "only marginally relevant to [his] overall credibility." *Reiger*, 789 F.2d at 1432-33. Such evidence did not implicate the defendant's Sixth Amendment rights to "reveal[] possible biases, prejudices, or ulterior motives." *Davis*, 415 U.S. at 316.

In this case, Owens was able to explore the motivations of both government witnesses to testify against her. She cross-examined both intensively on their cooperation agreement with the Government. *See Shimoda*, 819 F.2d at 229 ("when substantial cross-examination has taken place, courts are less inclined to find confrontation clause violations"). Evidence about one witness' prior convictions for robbery and car theft could not be said to "relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316. It was marginally relevant, if at all. To the extent Owens sought to impeach Roberts, the jury was not without substantial information as to the character of both witnesses. In closing argument, the prosecutor himself underlined their role in the crime: "the government would love to have all of our witnesses be priests and nuns.... They don't commit armed robberies

...so what we're stuck with are the people who *actually commit the robbery*." Court record at 3B-13 (emphasis added). That armed-robber Roberts was also a teenage purse-snatcher adds little to the record of bias or ulterior motivation which a defendant is constitutionally permitted to develop. *Cf. United States v. Guthrie*, 931 F.2d 564, 568 (9th Cir. 1991) (testimony about alleged involvement with murder may be excluded as unnecessary for jury to properly evaluate credibility). We conclude that the exclusion of his juvenile adjudication under Fed. R. Evid. 609(d) did not violate Owens' confrontation rights.

Defendant moved to strike the identification evidence offered by witness Garcia with respect to Roberts. She contends the photographic spread was improper and the testimony resulting from it was prejudicial, "unduly suggestive," and "an irreparable misidentification." Defendant fundamentally misapprehends the scope of the law. The line of cases she cites excludes from evidence testimony about an accused (not a third-party) if the identification procedures (not the testimony) are unduly suggestive and unreliable. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*,409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967). According to the Supreme Court, "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification'" of the accused. *Biggers* 409 U.S. at 198 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The doctrine protects the personal due process rights of criminal defendants. *Stovall*, 388 U.S. at 301-02.

Satisfied that no constitutional question is at issue here, we review the admission of photographic evidence and testimony under the standard applied to admissions

of evidence. The Government argued the identification went to corroborating Roberts' testimony. Defendant had every opportunity in cross-examination and closing argument to bring out the irregular nature of the photographic spread and the minimal corroborative value of Garcia's testimony. She also could have denied that the encounter too place. "Balancing the probative value of the evidence against its prejudicial effect and giving deference to the decisions of the district court," we conclude that the judge did not abuse his discretion. *Houser*, 929 F.2d at 1373.

CONCLUSION

Finding no reversible error, we affirm defendant's conviction.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR-91-147-RMT

UNITED STATES OF AMERICA,
Plaintiff,
v.
LOUISIANA JOHNSON OWENS,
Defendant.

JUDGMENT AND PROBATION/ COMMITMENT ORDER

There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offenses(s) of:

18 USC 371; 2114: Conspiracy to Commit Armed Postal Robbery as Charged in Count One of the Indictment: 18 USC 2114 and 18 USC 2(a), 2(B): Armed Postal Robbery as Charged in Count Two of the Indictment; 18 USC 2(a), 2(b): Use of a firearm during a crime of violence, Aiding and Abetting as Charged in Count Three of the Indictment.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 130 months. This term consists of 70 months on each of counts 1 and 2, for a total term 130 months.

Signed By: X U.S. District Judge,
ROBERT M. TAKASUGI

Dated/Filed Dec. - 3, 1991